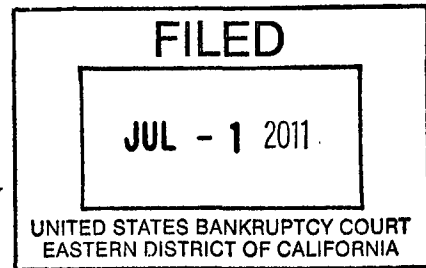


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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re)	Case No. 09-40067-E-13L
)	
CHRISTINA RUTH STANLEY,)	
)	
Debtor(s).)	
_____)	
)	
CHRISTINA RUTH STANLEY,)	
)	Adv. Pro. No. 10-2043 ✓
Plaintiff(s),)	
v.)	Docket Control No.: None
)	Provided
ONEWEST BANK, FSB, et al.,)	
)	
Defendant(s).)	
_____)	

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM OPINION AND DECISION

Defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), IMB HoldCo LLC, IMB Management Holdings LP, OneWest Bank Group LLC, OneWest Ventures Holdings LLC, and OneWest Bank, FSB ("OneWest") move for judgment on the pleadings on all Causes of Action in the First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(c) as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b).

1 Christina Stanley, the Plaintiff-Debtor, opposes the motion.

2 The court's decision is to grant the Motion, without prejudice
3 and without leave to amend, as to Mortgage Electronic Systems,
4 Inc., IMB HoldCo, LLC, IMB Management Holdings LP, OneWest Bank
5 Group LLC, OneWest Venture Holdings, LLC as to all Causes of
6 Actions and claims. The court grants the Motion, without prejudice
7 and without leave to amend, as to the First Cause of Action to the
8 extent that it requests injunctive relief or restitution, Fourth
9 Cause of Action (R.E.S.P.A. Claims) and Fifth Cause of Action
10 (Civil Conspiracy) and denies the Motion as to the First Cause of
11 Action (Declaratory Relief) to the extent that it requests
12 declaratory relief and the Second and Third Cause of Action
13 (Violation of Automatic Stay and Damages) as against OneWest Bank,
14 FSB. Further amendments of the FAC shall be as authorized by the
15 court.

16 STANDARD OF REVIEW

17 The standard of review under Federal Rule of Civil Procedure
18 ("Fed. R. Civ. P.") 12(c) is the same as the standard under Fed. R.
19 Civ. P. 12(b)(6). See *Great Plains Trust Co. v. Morgan Stanley*
20 *Dean Witter & Co.* 313 F.3d 305, 308 n.8 (5th Cir. 2002); *Quest*
21 *Communications Corp. v. City of Berkeley*, 208 F.R.D. 288, 291 (N.D.
22 Cal. 2002), *aff'd* 433 F.3d 1253 (9th Cir. 2006), *overruled in part*
23 *on other grounds by Sprint Telephony PCS, L.P. v. County of San*
24 *Diego*, 543 F.3d 571, 577 (9th Cir. 2008). In addition, under the
25 Supreme Court's most recent formulation of Rule 12(b)(6), a
26 plaintiff cannot "plead the bare elements of his cause of action,
27 affix the label 'general allegation,' and expect his complaint to
28 survive a motion to dismiss." *Ashcroft v. Iqbal*, 129 S.Ct 1937,

1 1954 (2009). Instead, a complaint must set forth enough factual
2 matter to establish plausible grounds for the relief sought. See
3 *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). ("[A]
4 plaintiff's obligation to provide 'grounds' of his 'entitle[ment]'
5 to relief requires more than labels and conclusions, and a
6 formulaic recitation of the elements of a cause of action will not
7 do."). Factual allegations must be enough to raise a right to
8 relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A.
9 MILLER, *FED. PRACTICE AND PROCEDURE* § 1216, at 235-36 (3d ed. 2004)
10 ("[T]he pleading must contain something more . . . than . . . a
11 statement of facts that merely creates a suspicion [of] a legally
12 cognizable right of action"). However, all allegations of fact by
13 the party opposing the motion are accepted as true and are
14 construed in the light most favorable to that party. *McGlinchy v.*
15 *Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

16 A motion for judgment on the pleadings under Rule 12(c) is
17 "essentially equivalent to a Rule 12(b)(6) motion to dismiss, so a
18 district court may 'dispose of the motion by dismissal rather than
19 judgment.'" *Technology Licensing Corp. v. Technicolor USA, Inc.*,
20 2010 WL 4070208 (E.D. Cal. Oct. 18, 2010) (quoting *Sprint Telephony*
21 *PCS, L.P. v. County of San Diego*, 311 F.Supp.2d 898, 902 03
22 (S.D.Cal.2004)). The moving parties have expressly requested that
23 the court dismiss the adversary proceeding. Given the nature of
24 the pleadings in this case and the requested relief, the court
25 shall proceed to consider the request and rule on this in the same
26 manner as a Rule 12(b) motion to dismiss.

27 Generally, the court may consider only the allegations made in
28 the complaint and the answer; extrinsic evidence and factual

1 contentions may not be taken into account. *Powe v. Chicago*, 664
2 F.2d 639, 642 (7th Cir. 1981). If extrinsic matters are offered
3 and not excluded by the court, then the motion for judgement on the
4 pleadings is converted to a motion for summary judgement. Fed. R.
5 Civ. P. 12(d); *Hal Roach Studios, Inc.*, 896 F.2d at 1550. The
6 court shall not treat the present motion as a summary judgment, but
7 limited it to what has been expressly requested by the Defendants,
8 a motion to dismiss the FAC.

9 **EXTRINSIC EVIDENCE CONSIDERED**

10 Both the Defendants and Debtor offer extensive extrinsic
11 evidence in support of their positions. In both cases these facts
12 were not included in the pleadings which the court must look to in
13 deciding a Fed. R. Civ. P. 12(c) motion. Defendants' exhibits are
14 offered under the guise of being judicially noticeable; they are
15 not. Only those facts which are generally known within the
16 territorial jurisdiction of the court or capable of accurate and
17 ready determination by resort to the sources whose accuracy cannot
18 reasonably be questioned. Fed. R. Evid. 201(b). The exhibits
19 offered by Defendants -- a deed of trust and notices issued
20 pursuant to the Real Estate Settlement Procedures Act ("RESPA"),
21 12 U.S.C. §§2601-2617 -- are not sources whose accuracy cannot
22 reasonably be questioned. See, e.g., Fed. R. Evid. 802, 901.

23 Moreover, Plaintiff-Debtor's 129-page exhibit document lodged
24 with chambers is not properly considered in this context.
25 Plaintiff-Debtor uses the exhibit document to attempt to bolster
26 the substance of general allegations made in the FAC or make new
27 allegations. This is not permitted.

28 ///

1 GROUNDS STATED IN MOTION FOR RELIEF REQUESTED

2 In this case the various Defendants bring the present motion
3 to dismiss the FAC as to all Defendants for failure to state a
4 claim against any of the Defendants. The grounds for relief on
5 this Motion stated with particularity as required by Rule 7,
6 Federal Rules of Civil Procedure, and Rule 7007, Federal Rules of
7 Bankruptcy Procedure are:

8 1. There are no charging allegations against any defendants
9 other than OneWest Bank.

10 2. As to OneWest Bank are meritless and predicated on
11 demonstrably inaccurate allegations that OneWest Bank -

12 a. Prepared and issued informational statements
13 pursuant to the Real Estate Settlement Procedures Act,

14 b. (b) Which statements advised of an escrow account
15 payment increase in the post-petition period,

16 c. Which the Plaintiff-Debtor wrongly characterizes as
17 an impermissible effort to collect a debt in violation of
18 the automatic stay.

19 3. Plaintiff-Debtor' FAC does not allege any particular
20 statement which was generated by OneWest Bank.

21 4. Plaintiff-Debtor also advances a theory that the filing
22 of the proof of claim by OneWest Bank violates the automatic stay.

23 Therefore, the Defendants conclude that the FAC should be
24 dismissed as to all Defendants without leave to amend.

25 ALLEGATIONS IN FAC AS TO NON-ONEWEST DEFENDANTS

26 The court's consideration of this Motion begins with the
27 allegations actually made in the FAC as to the Defendants other
28 than OneWest Bank. The FAC makes generic references to

1 "Defendants" in making broad allegations of misconduct, which
2 requires the court to consider the specific allegations of
3 misconduct, which defendant is alleged to have engaged in the
4 conduct, and then interpret what alleged misconduct relates to
5 which subgroup of "Defendants" in the FAC.

6 The specific allegations in the FAC include:

7 1. Plaintiff-Debtor is the debtor in this Chapter 13 case
8 and resides in real property which secures an obligation of the
9 Plaintiff-Debtor on a promissory note. FAC, ¶ 10.

10 2. Casa Blanca Mortgage, Inc, dba Shearson Mortgage received
11 an adjustable rate promissory Note ("Note") FAC, ¶ 23.

12 3. The Deed of Trust securing the Note ("Deed of Trust")
13 does not provide for an escrow account. FAC ¶ 31.

14 4. MERS was assigned the servicing responsibilities for the
15 Note. FAC, ¶¶ 12, 23.

16 5. IndyMac Federal Savings Bank, FSB purchased the Note.
17 FAC, ¶ 15.

18 6. The FDIC was appointed as receiver for IndyMac Bank and
19 its assets were passed through:

20 a. IMB HoldCo, LLC, FAC, ¶¶ 16, 25;

21 b. IMB Management Holdings, LLC, FAC ¶¶ 18, 25;

22 c. OneWest Venture, LLC, FAC, ¶¶ 19, 25;

23 d. OneWest Bank Group, LLC, FAC, ¶¶ 20, 25; and
24 ultimately to

25 e. OneWest Bank, FSB, FAC, ¶¶ 15, 25.

26 7. A general allegation that unidentified "Defendant(s)"
27 were the agents for the FDIC during the period the assets were
28 passed to OneWest Bank, FSB. FAC ¶ 27.

1 8. A general allegation that unidentified "Defendant(s)"
2 were the agents for OneWest Bank, FSB . FAC ¶ 25.

3 9. Fidelity National Information Services, Inc. is a
4 defendant with default software and/or usage of NewTrak, and is in
5 privity with the actual holder of the secured claim in this
6 bankruptcy case. FAC, ¶ 21.

7 10. Plaintiff-Debtor's Chapter 13 Plan provides for payment
8 of the Note as a Class 1 claim in this bankruptcy case.
9 FAC, ¶¶ 35, 39.

10 11. OneWest Bank filed a proof of claim on or about July 15,
11 2009, based on the Note and Deed of Trust which includes all past
12 due mortgage payments, property tax or insurance advances, and
13 escrow balances. FAC, ¶ 38.

14 12. An unnamed "Defendant," conducted an "Escrow Analysis"
15 pursuant to RESPA upon notice of a bankruptcy filing. FAC, ¶ 50.

16 13. Unnamed "Defendants" do not distinguish between pre and
17 post-petition escrow advances when conducting a post-petition
18 escrow analysis. FAC, ¶ 51.

19 14. On July 17, 2009, unnamed "Defendants" forwarded a letter
20 to the Chapter 13 Trustee informing him that the post-petition
21 mortgage payments increased to \$2,065.91. FAC, ¶ 42.

22 15. Based on the alleged increase in the post-petition
23 monthly mortgage payment the Chapter 13 Trustee objected to the
24 Plaintiff-Debtor's proposed Chapter 13 Plan. FAC, ¶ 43.

25 16. On February 16, 2010, an unnamed "Defendant" stated that
26 the correct post-petition monthly mortgage payment is \$1,969.85,
27 and that any prior notices with a different amount are incorrect.
28 FAC, ¶ 45.

1 17. Unnamed "Defendants" acts of issuing the post-petition
2 mortgage changes were for the purpose of collecting pre-petition
3 claims. FAC, ¶ 54, 56.

4 18. Actions of unidentified "Defendants" were willfully and
5 intentionally done to obtain payment on pre-petition claims through
6 increased post-petition Note payments. FAC, ¶¶ 80, 81.

7 19. Unidentified "Defendants'" use of the post-petition
8 notices of Note payment increases are intentional, with knowledge
9 of the automatic stay, systematic, and to collect pre-petition
10 amounts owed by Plaintiff-Debtor. FAC, ¶¶ 66, 67, 68, 71.

11 20. Unidentified "Defendants" knew that when the Chapter 13
12 Trustee received the notices of post-petition increased Note
13 payments, the Trustee would collect the increased amount from the
14 Plaintiff-Debtor for the unidentified "Defendants." FAC, ¶ 99.

15 21. Unidentified "Defendants" increased the post-petition
16 Note payments with the knowledge that it was improper and would not
17 be permitted by the court unless it was so provided in a confirmed
18 Chapter 13 plan or pursuant to an order granting relief from the
19 automatic stay. FAC, ¶ 106.

20 22. As a direct result of the post-petition notices of
21 changes in the mortgage payments, the Chapter 13 Trustee collected
22 the post-petition increased mortgage payments on the Note. FAC,
23 ¶ 54.

24 23. Unidentified "Defendants'" post-petition escrow analysis
25 includes "both post-petition advances of pre-petition escrow
26 advances and fails to distinguish between escrow advances."
27 FAC, ¶ 64.

28 24. Unidentified "Defendants" acts have resulted in

1 Plaintiff-Debtor paying pre-petition taxes through the increased
2 post-petition Note payments. FAC, ¶ 74.

3 25. Unidentified "Defendants" acts have resulted in
4 Plaintiff-Debtor paying for improper forced place insurance through
5 the increased post-petition Note payments. FAC, ¶ 75.

6 26. Unidentified "defendants" are alleged to have conspired
7 to collect escrow advances through post-petition Note payment
8 increases. FAC, ¶ 97.

9 **CLAIMS ASSERTED AS TO THE NON-ONEWEST BANK, FSB DEFENDANTS**

10 In the FAC the Plaintiff-Debtor makes broad sweeping
11 allegations of conduct against unidentified "Defendants" or
12 "Defendant." All but OneWest Bank, FSB, are alleged to have held
13 an interest in the Note sometime in the past or provided loan
14 servicing, but only OneWest Bank, FSB, is alleged to have asserted
15 any rights or interest in the Note in this bankruptcy case. As
16 discussed in this ruling, merely alleging that someone was involved
17 in a conspiracy does not make them responsible for the conduct of
18 the defendant alleged to have engaged in the improper conduct.

19 As to the first four causes of action, the only Defendant
20 alleged to have engaged in the conduct at issue is OneWest Bank,
21 FSB. From the allegations in the FAC, all of the other parties'
22 interests alleged interests in the Note and Deed of Trust predate
23 the bankruptcy filing. For Fidelity National Information Services,
24 Inc., the only allegation is that it provides software which
25 OneWest Bank, FSB may have used in computing the post-petition
26 mortgage payments. No plausible claims are stated against the non-
27 OneWest Bank, FSB defendants. Rather, it appears that the Debtor
28 is attempting to wrap them into this action by alleging a civil

1 conspiracy.

2 The Fifth Cause of Action, Civil Conspiracy, merely re-alleges
3 the allegations in paragraphs 83 through 95 of the FAC (RESPA
4 alleged violations), which incorporates other allegations in the
5 FAC, and further asserts,

6 1. Defendants have a common objective and course of action
7 to improperly obtain payment of the pre-petition arrearage by
8 incorrectly computing the post-petition installments due on the
9 Note.

10 2. Defendants intended by the notice of the post-petition
11 installment increase to cause the Chapter 13 Trustee to collect the
12 incorrect amounts from the Plaintiff-Debtor and pay those amounts
13 to OneWest Bank.

14 3. OneWest Bank filed an objection to confirmation asserting
15 the incorrect post-petition installment amount as part of its
16 efforts to collect the incorrect amount.

17 4. The Defendants collectively concealed the practice of
18 incorrectly computing post-petition installments and that OneWest
19 Bank was improperly collecting the pre-petition arrearage as part
20 of the post-petition installments, as well as collecting the pre-
21 petition arrearage under the terms of the Chapter 13 Plan.

22 To establish a civil conspiracy in California one must show
23 that defendants jointly engaged in a tort. There is no separate
24 civil action for conspiracy to commit a tort without there being an
25 actual wrongful act committed. *Favila v. Katten Muchin Rosenman,*
26 *LLP*, 188 Cal.App.4th 189, 206 (2010), and 5 WITKIN SUMMARY OF CALIFORNIA
27 LAW TORTS, §45. The effect of the "conspiracy" is that each of the
28 defendants involved is individually liable. Though incorporating

1 the general allegation paragraphs and the RESPA cause of action
2 allegations, the general allegations of a conspiracy are generally
3 made as to unidentified Defendants.

4 The California District Court of Appeal in *Black v. Bank of*
5 *America*, 30 Cal. App. 4th 1 (1994) conducted the review of a
6 conspiracy claim and the proper basis for such a claim when the
7 parties involved were a corporation and the agents or employees of
8 the corporation. The court concluded that it is well established
9 California law that employees or agents of a corporation cannot
10 conspire with their principal or employer when acting in their
11 official capacity. In *Gruenberg v. Aetna Ins. Co*, 9 Cal.3d 566
12 (1973), the California Supreme Court concluded that an insured
13 could not state a conspiracy claim against his insurance company
14 and a separate insurance adjusting firm, a separate law firm, and
15 employees of the two separate firms because only the insurance
16 company had a duty of good faith and fair dealing with the insured.
17 The two separate firms were not a party to the insurance contract
18 and did not have such a duty to the plaintiff. In its *Doctors' Co.*
19 *v. Superior Court*, 49 Cal3d 39 (1989), decision the California
20 Supreme Court held that an attorney and an expert witness employed
21 by an insurance company could not be held liable for conspiring to
22 violate the company's statutory duties, again because the statutory
23 duties were owed only by the insurance companies.

24 In *Younan v. Equifax Inc.*, 111 Cal.App. 3d 39 (1980), the
25 court rejected a conspiracy claim for constructive fraud alleged to
26 be based on a breach of fiduciary duty owed by a disability
27 insurer. The insurer's agents did not owe the plaintiff a
28 fiduciary duty, and only the insurer itself owed the fiduciary

1 duty. However, the court allowed stand a claim for conspiracy to
2 commit actual fraud, since even the agents owed a duty to the
3 plaintiff to "abstain from injuring the plaintiff through express
4 misrepresentations, independent of the insurer's implied covenant
5 of good faith and fair dealing."

6 This issue is further addressed by the Supreme Court in
7 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*, 7 Cal. 4th 503
8 (1994). The Supreme Court first distinguished between alleged
9 conspiracies arising out of tort claims and contract claims. For
10 contract claims, there is no tort obligation for one contracting
11 party not to interfere with the performance of the contract. There
12 is merely a contractual obligation to perform as promised.
13 Therefore, a party to a contract cannot be bootstrapped into a
14 conspiracy tort.

15 For there to be a civil conspiracy there must be "the
16 formation and operation of the conspiracy and damage resulting to
17 plaintiff from an act or acts done in furtherance of the common
18 design . . . In such an action the major significance of the
19 conspiracy lies in the fact that it renders each participant in the
20 wrongful act responsible as a joint tortfeasor for all damages
21 ensuing from the wrong, irrespective of whether or not he was a
22 direct actor and regardless of the degree of his activity." *Id*,
23 p. 512.

24 In this case, all of the operative allegations have been made
25 against OneWest Bank for the remaining claims in this case for
26 which the nonspecific conspiracy is alleged: (1) Declaratory Relief
27 to determine the correct amount of the post-petition mortgage
28 payments and (2) alleged violation of the automatic stay by OneWest

1 Bank in increasing the post-petition mortgage payment and its
2 actions to obtain payment of that increased amount. The Plaintiff-
3 Debtor only makes boilerplate allegations that unnamed Defendants
4 "conspired" for the "recouping of pre-petition claims from post-
5 petition estate property resulting in systematic injury to
6 debtors." FAC ¶ 97. Further, there is no allegation as to what
7 duties, if any, that these unnamed Defendants owe to the Plaintiff-
8 Debtor and the damages to these Plaintiff-Debtor caused by the
9 breach of those duties.

10 The court grants the motion to dismiss the FAC in toto as to
11 Mortgage Electronic Registration Systems, Inc., IMB HoldCo, LLC,
12 IMB Management Holdings, LLC, OneWest Venture, LLC, and OneWest
13 Bank Group, LLC without prejudice. The court does not grant leave
14 to amend at this time, in part because this is the FAC which has
15 been fashioned after considerable effort by the Plaintiff-Debtor
16 and the lack of any allegations that any of these Defendants have
17 been involved in any way in this bankruptcy case or conduct of
18 OneWest Bank, FSB. If the Plaintiff-Debtor believes that she
19 subsequently identify facts sufficient to allege claims against the
20 other Defendants, she may seek leave to amend from the court.

21 It has not been alleged that OneWest Bank and others breached
22 their duties to the Plaintiff-Debtor by conspiring with others.
23 OneWest Bank, FSB cannot conspire with itself to violate an
24 obligation it owes to the Plaintiff-Debtor. The court dismisses
25 the Fifth Cause of Action for conspiracy as to OneWest Bank, FSB
26 without prejudice and without leave to amend.

27 **FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF**

28 The court may only grant declaratory relief where there is an

1 actual controversy within its jurisdiction. *Am. States Ins. Co. v.*
2 *Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be
3 definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S.
4 227, 240-41 (1937). OneWest argues that Debtor has failed to set
5 out any facts demonstrating that a RESPA Notice was generated to
6 collect pre-petition claims. However, in reading the FAC in the
7 light most favorable to the Plaintiff-Debtor, the FAC does state
8 that OneWest Bank conducted an escrow analysis, that the escrow
9 analysis caused pre-petition escrow shortfalls to be included in
10 post-petition payments, and that Plaintiff-Debtor and Chapter 13
11 Trustee were notified of this improper increased amount so that
12 such amount would be paid post-petition to OneWest Bank. Further,
13 it is alleged that OneWest Bank has received the improper post-
14 petition payments.

15 From a fair reading of the FAC it is clear that Plaintiff-
16 Debtor allege that a dispute exists between OneWest Bank and
17 Plaintiff-Debtor concerning the correct amount of the post-petition
18 installments which are properly due on the secured claim. The
19 request for declaratory relief is not duplicative of other causes
20 of action. Only after the court determines the correct amount of
21 the post-petition payments will the Plaintiff-Debtor, OneWest Bank,
22 FSB, and the Chapter 13 Trustee know the correct amount to be paid
23 monthly. Determination of this amount is independent of any
24 determination as to whether OneWest Bank, FSB's conduct violated
25 the automatic stay. Merely because the parties disagree as to the
26 correct computation of a post-petition payment does not
27 automatically create an actionable violation of the automatic stay.

28 The court reads OneWest Bank's Motion to also object to the

1 Plaintiff-Debtors sliding a reference to injunctive relief and
2 restitution into the First Cause of Action. To the extent that the
3 Plaintiff-Debtors are seeking injunctive relief, restitution, or
4 other adjudication of rights in the First Cause of Action, such are
5 improper as part of this declaratory relief claim. To the extent
6 that a "dispute" exists as to whether any of the Defendants have
7 violated rights of the Plaintiff-Debtors, then the appropriate
8 action may be commenced asserting those rights and damages which
9 may be recoverable. Plaintiff-Debtors have not pleaded claims for
10 the additional relief, but has merely added those words to the
11 relief requested. The court will not, and cannot, issue a
12 precursory or advisory opinion as to other rights or interests the
13 Plaintiff-Debtors may or may not have against any of the
14 Defendants.

15 The Motion is denied as to the claim for Declaratory Relief
16 against OneWest Bank, and is granted to the extent that the First
17 Cause of Action includes a request for injunctive relief or
18 restitution, that portion is dismissed without prejudice. No leave
19 to amend is granted.

20 **SECOND AND THIRD CAUSES OF ACTION FOR**
21 **VIOLATION OF AUTOMATIC STAY**

22 The Plaintiff-Debtor asserts that the conduct of OneWest Bank,
23 FSB in increasing the post-petition payments violated the automatic
24 stay by recovering payment of pre-petition arrearage outside of a
25 Chapter 13 plan. The Plaintiff-Debtor alleges that OneWest Bank,
26 FSB has asserted the claim in this case and sought to obtain
27 payment on the obligation evidenced by the Note. The Plaintiff-
28 Debtor does not allege that any of the other persons named as

1 Defendants filed a claim or attempted to obtain payment on the
2 Note.

3 OneWest argues that Plaintiff-Debtor fail to alleged
4 sufficient facts to establish a controversy, Plaintiff-Debtor
5 failed to plead the existence of a post-petition RESPA Notice,
6 that a RESPA Notice could not violate the automatic stay as a
7 matter of law, the request for declaratory relief is impermissibly
8 duplicative, and Plaintiff-Debtor fail to allege sufficient facts
9 to establish a controversy with regarding a proof of claim.

10 OneWest Bank, FSB, places great reliance on the Bankruptcy
11 Appellate Panel decision in *Zotow v. Johnson, et. al.*, 432 B.R. 252
12 (9th Cir. BAP 2010). In seeking to dismiss this cause of action,
13 OneWest Bank, FSB asserts that a RESPA Escrow Account Disclosure
14 Statement, as a matter of law, is merely informational and not an
15 attempt to collect a debt. In *Zotow*, BAC Home Loan Servicing, LP
16 ("BAC") sent one post-petition notice to the debtors showing an
17 increase in the post-petition monthly mortgage payment. It was
18 further alleged that BAC received several payments from the Chapter
19 13 trustee at the increased amount. The Bankruptcy Appellate Panel
20 was reviewing the decision of the bankruptcy court after an
21 evidentiary hearing on an objection to claim, not on a motion to
22 dismiss.

23 The *Zotow* court first considered the decision of the Fifth
24 Circuit Court of Appeals in *Campbell v. Countrywide Home Loans,*
25 *Inc.*, 545 F.3d 348 (5th Cir. 2008). In *Campbell*, the Fifth Circuit
26 Court of Appeals concluded that the automatic stay precluded
27 Countrywide Home Loans, Inc. ("Countrywide") from attempting to
28 obtain payment on pre-petition arrearages other than as permitted

1 by the Bankruptcy Code. The obligation owing for a pre-petition
2 arrearage, even if the claim is subject to the anti-modification
3 provision of 11 U.S.C. § 1325(b)(2), is a pre-petition claim
4 subject to the automatic stay provisions of 11 U.S.C. § 362(a).
5 *Id.* at 354. However, the only conduct by Countrywide in *Campbell*
6 was filing a proof of claim stating the higher installment amount.
7 Filing a proof of claim, even one which grossly overstates the
8 claim, was not held to be a violation of the automatic stay. *Id.*
9 at 356.

10 The Third Circuit Court of Appeals has also addressed this
11 issue, again with Countrywide increasing the post-petition
12 installments to recover a pre-petition arrearage. After the
13 bankruptcy case was filed, Countrywide issued a revised escrow
14 analysis and demand for payment to the debtors. The Third Circuit
15 Court of Appeals concluded that the pre-petition arrearage was part
16 of the pre-petition claim which was governed by the Bankruptcy
17 Code. Countrywide was entitled to be paid the pre-petition
18 arrearage portion of its claim, but Countrywide could not violate
19 the automatic stay to obtain payment of the pre-petition arrearage.
20 The Third Circuit concluded that an attempt to obtain payment of a
21 pre-petition arrearage outside the plan payment could be a
22 violation of the stay. The matter was remanded to the trial court
23 to determine if the violation was willful to support an award of
24 damages pursuant to 11 U.S.C. § 362(k). *In re Rodriguez*, 629 F.3d.
25 136, 143-144 (3rd Cir. 2010). This decision was issued after the
26 Bankruptcy Appellate Panel ruling in *Zotow*.

27 The Panel in *Zotow* considered the scope of the automatic stay
28 with respect to communications relating to pre-petition claims.

1 Not every communication is prohibited. Rather, prohibited
2 communications are those which, based on direct or circumstantial
3 evidence, are geared toward collection of pre-petition debt, and
4 which are accompanied by coercion or harassment. *Zotow*, 432 B.R.
5 at 259. Relying on *Morgan Guar. Trust Co. Of N.Y. v. Am. Sav. And*
6 *Loan Ass'n*, 804 F.2d 1487, 1491 (9th Cir. 1986), the Panel
7 concluded that a mere request for payment and informational
8 statement are permissible communications which do not violate the
9 automatic stay. *Id.* The Bankruptcy Appellate Panel also recognizes
10 that, "Whether a communication is a permissible or prohibited one
11 is a fact-driven inquiry which makes any bright line test
12 unworkable." *Id.* at 258.

13 In *Morgan Guar. Trust Co.*, the Ninth Circuit addressed the
14 issue of whether the presentment of a Note issued by Johns Manville
15 violated the automatic stay.¹ Because the automatic stay seeks to
16 ensure the orderly administration of the debtor's estate, provide
17 a breathing spell for the debtor, maintain the status quo, and
18 prevent harassment of a debtor by sophisticated creditors, a
19 request for payment (as with the presentment of a negotiable
20 instrument) does not violate the automatic stay unless it is
21 accompanied by coercion or harassment, such as immediately or
22 potentially threatening the debtor's possession of property.
23 *Morgan*, 804 F.2d at 1491. Examples of communications cited by the
24 Ninth Circuit as violating the automatic stay included: (1) notice
25 of intent to terminate lease, (2) notice of intent to terminate
26 franchise, (3) notice of medical clinic refusal to provide future

27
28 ^{1/} This predated the amendment to 11 U.S.C. § 362(b)(10)
which exempts presentment of a negotiable instrument from the
automatic stay.

1 medical services because of refusal to pay for prior services,
2 (4) letter informing debtor that an attorney had been hired to
3 collect a delinquent account, (5) college refusing to release
4 transcripts as a method to force payment, and (6) a creditor who
5 made repeated visits and telephone calls to a debtor. *Id.*
6 Examples of communications not violating the automatic stay
7 included: (1) letter sent to debtor's attorney that a credit union
8 would not have further business dealings with the debtor unless
9 debt was reaffirmed, and (2) communications setting out the basis
10 of the claim (informal proof of claim). *Id.*

11 The *Zotow* court concluded that the stay had not been violated
12 on the facts of that case because Countrywide sent a single notice
13 which did not request payment. The one notice communicated the
14 information obtained in the recent escrow analysis computed by
15 Countrywide. The record established at the evidentiary hearing
16 revealed no indication that Countrywide attempted to collect the
17 pre-petition arrearage outside the bankruptcy court. The Panel
18 placed significant weight on there being only a single notice sent
19 to the debtor. Given that there was one notice, no other action
20 taken to obtain payment, and undisputed facts which did not
21 constitute harassment or coercion, the Panel concluded that the
22 single notice did not violate the automatic stay.

23 Applying both the spirit and letter of *Morgan Guar. Trust Co.*,
24 creditors and debtors are allowed to communicate their disparate
25 positions and rights they seek to assert. It is when coercion or
26 harassment is coupled with the communication that they can be a
27 violation of the automatic stay.

28 In this case, the Plaintiff-Debtor argues that the calculation

1 itself, in addition to the filing of the notice of change in
2 mortgage payment, violates the automatic stay. It is asserted that
3 filing the notice of change in mortgage payment will result in the
4 Chapter 13 Trustee forcing the Plaintiff-Debtor to pay the pre-
5 petition arrearage as a post-petition mortgage installment rather
6 than as a proper plan payment. However, the Plaintiff-Debtor
7 alleges nothing more to indicate that there was any harassing or
8 coercive conduct by OneWest Bank. Merely that it asserted the
9 right to a higher post-petition payment based upon its
10 interpretation of RESPA.

11 With respect to OneWest Bank (the court having identified
12 OneWest Bank as the only potential defendant being referenced under
13 the Second and Third Causes of Action), the Plaintiff-Debtor make
14 generic broad sweeping allegations of a pattern of conduct in which
15 OneWest Bank attempted to obtain payment on a pre-petition claim
16 outside the strictures of the Bankruptcy Code. But the specific
17 allegations in this case are that OneWest Bank communicated to the
18 Plaintiff-Debtor, Chapter 13 Trustee, and everyone else in the case
19 that OneWest Bank computed an increase in the post-petition
20 payments. At best, the Plaintiff-Debtor argues that she knew the
21 Chapter 13 Trustee could seek to dismiss the case if she failed to
22 pay an undisputed post-petition mortgage payment or otherwise
23 assert their contention as to the correct amount.

24 The allegations in this indicate that there was some
25 communication and correction made by OneWest Bank to the extent
26 that a dispute was identified. While stating that the post-
27 petition monthly mortgage payments were noticed as increasing to
28 \$2,443.91 (FAC, ¶ 42), this was reduced to \$1,634.00 (FAC, ¶ 43) in

1 October 2009, and \$1,242.63, with a refund of \$3,225.80, in January
2 2010 (FAC, ¶ 44). The court does not have any allegations relating
3 to how and why these adjustments were made, but she appears
4 indicative of a creditor attempting to determine the correct
5 amount, rather than one blindly demanding incorrect sums.

6 Glaring in its absence in the FAC are any allegations
7 contending that OneWest Bank, either directly or indirectly,
8 threatened or harassed the Plaintiff-Debtor. Commonly in the
9 context of consumer harassment one sees multiple phone calls,
10 multiple letters, and communications stating that adverse
11 consequences will occur if the consumer does not immediately comply
12 with the demands made by the creditor. In this case, nothing is
13 alleged. Merely that Central Mortgage provided notice that it
14 computed a post-petition installment payment increase and the
15 Plaintiff-Debtor did not object to the increased payment.

16 The court also rejects Plaintiff-Debtor's apparent contention
17 that she has no obligation to address disputes concerning the
18 proper post-petition payment amounts to be made for Class 1 or
19 Class 2 Claims, or the correct determination of a creditor's pre-
20 petition arrearage to be paid through the Chapter 13 Plan.
21 Plaintiff-Debtor appears to have adopted a strategy that rather
22 than addressing such issues as part of confirming or enforcing
23 their Chapter 13 plan, she can elect instead to sue the creditor
24 alleging a violation of the automatic stay and seek monetary
25 recovery.

26 Plaintiff-Debtor has the option of choosing to file a
27 Chapter 13 reorganization or Chapter 7 liquidation. Choosing a
28 reorganization necessarily entails much more significant emotional,

1 financial, and time commitments than merely filing a Chapter 7 and
2 proceeding directly to a fresh start. However, a properly
3 prosecuted Chapter 13 case can yield a significantly advantageous
4 economic benefit for debtors. In many cases debtors strip junior
5 liens from their residence and cure the arrearage on the senior
6 lien, thereby saving their home and realizing future appreciation
7 without paying the junior liens.

8 In this setting, it is not unreasonable for a Chapter 13
9 debtor, advancing the interests of the estate and the debtor, to
10 address a pre-petition claim dispute consisting of the correct
11 computation of the post-petition payment. This includes
12 determining the correct amount of the pre-petition arrearage to be
13 paid through the plan. A debtor has many different tools in his or
14 her arsenal, including filing a claim for the creditor, objecting
15 to a claim, obtaining a determination of a plan term as part of a
16 confirmation hearing, supplemental proceedings in enforcement of a
17 plan,² and a declaratory relief action. To the extent that there
18 exists a contractual attorneys' fees provision, presumably a
19 prevailing debtor would seek to recover attorneys' fees and costs
20 for the benefit of the estate and other creditors.

21 Though creditors' counsel may argue that the present type of
22 situation arises because a debtor fails to communicate with the
23 creditor, the court is cognizant of the realities of modern home
24 loan debt servicing. The persons computing the current (post-
25

26 ^{2/} 11 U.S.C. Section 1327(a) provides, "The provisions of a
27 confirmed plan bind the debtor and each creditor,..., and whether
28 or not such creditor has objected to, has accepted, or has
rejected the plan." This is the new "contract" to be enforced
between the parties. *Max Recovery v. Than (In re Than)* 215 B.R.
430 435 (9th Cir. BAP 1997).

petition) mortgage payments are separate from the bankruptcy group and the attorney (if any) attempting to represent the creditor in the bankruptcy case. Whether because of the volume of defaulted home loans or a conscious management decision, a thoughtful response to a debtor's dispute of a mortgage payment or arrearage calculation often does not occur until the creditor and counsel are forced to a court hearing.

OneWest Bank's argument that RESPA creates a free floating exemption from the automatic stay for however it computes and seeks payment of post-petition mortgage installments is as unpersuasive with this court as that argument has been with the courts in *Rodriguez* and *Campbell*. While the Bankruptcy Code does not prohibit adjustments for post-petition changes authorized by RESPA, the automatic stay provisions of 11 U.S.C. §362(a) prohibit the collection of pre-petition debts outside of the bankruptcy. Had Congress intended to exempt only demands for payment cloaked in RESPA from the automatic stay it would have said so in a clear and unambiguous manner. Congress clearly knows how to make an exception to the automatic stay, see 11 U.S.C. §362(b), and the court will not imply that Congress gave OneWest Bank and other servicers or Note owners free reign to do whatever they sought to obtain payment on pre-petition claims without regard to the Bankruptcy Code.

The motion to dismiss the Second and Third Causes of Action³

³/ The Third Cause of Action asserts a "violation" of 11 U.S.C. § 362(k). Subparagraph (k) is a remedies provision for violation of the other provisions of § 362. The court reads the Second and Third Causes of Action as one claim for statutory damages under § 362(k), as opposed to a request for sanctions under 11 U.S.C. § 105 and the inherent powers of this court.

1 for violation of the automatic stay against OneWest Bank is granted
2 and the causes of action are dismissed without prejudice. No leave
3 to amend granted.

4 **FOURTH CAUSE OF ACTION**
5 **VIOLATION OF REAL ESTATE SETTLEMENT PROCEDURES ACT**

6 Plaintiff-Debtor alleges that the Note is subject to loan
7 servicing provisions of RESPA. It is further alleged that under
8 RESPA the Defendants were required to provide Plaintiff-Debtor with
9 written notice of each sale or transfer of the assignment, sale or
10 transfer of the loan or changes in the servicer for the loan.

11 The FAC alleges that the various Defendants alleged to have
12 acquired and transferred the Note, until it ultimately ended up
13 with OneWest Bank failed to provide such written notices.
14 Plaintiff-Debtor further assert that the Defendants have violated
15 RESPA by improperly computing the monthly post-petition
16 installments which have been demanded and collected from the
17 Plaintiff-Debtor. Additionally, that Defendants have failed to
18 refund or credit back charges for improperly placed insurance, and
19 have sent Plaintiff-Debtor incorrect post-petition RESPA escrow
20 analyses.

21 As correctly stated by Defendants, while a private right of
22 action exists for the failure to provide the servicing notice, the
23 Plaintiff-Debtor must assert a damages claim caused by the failure
24 to provide the notice. 12 U.S.C. § 2605(f), *Jensen v. Quality Loan*
25 *Serv. Corp.*, 702 F. Supp. 2d 1183, 1196-1197 (E.D. Cal. 2010), and
26 *Wilson v. JP Morgan Chase Bank*, 2010 U.S. Dist. LEXIS 63212 (E.D.
27 Cal. 2010). From a review of the FAC, the Plaintiff-Debtor does not
28 assert any damages arising from the failure to provide the notices

1 of change in servicer.

2 An additional RESPA claim has been asserted for the improper
3 calculation of post-petition installments. The FAC is clear that
4 the only alleged conduct in asserting an increase in post-petition
5 installments has been by OneWest Bank. However, as asserted by
6 Defendants, no private right of action is provided for a violation
7 of the limitation on requirement of advance deposits in escrow
8 accounts pursuant to 12 U.S.C. §2604. See *Hensley v. Bank of N.Y.*
9 *Mellon*, 2010 U.S. Dist. LEXIS 135812 (ED Cal. 2010), and *Brohpy v.*
10 *Chase Manhattan Mortgage Co.*, 947 F. Supp. 879, 883 (E.D. Penn.
11 1996).

12 The Fourth Cause of Action is dismissed as to OneWest Bank,
13 without prejudice. No leave to amend is granted at this time.

14 CONCLUSION

15 The court grants the Motion and dismisses the FAC and all
16 causes of action as to Mortgage Electronic Registration Systems,
17 Inc., IMB HoldCo, LLC, IMB Management Holdings, LLC, OneWest
18 Venture, LLC, FAC, and OneWest Bank Group, LLC without prejudice
19 and without leave to amend.

20 The court grants the Motion and dismisses that portion of the
21 First Cause of Action which requests injunctive relief or
22 restitution, and the Second, Third, Fourth and Fifth Cause of
23 Action as to OneWest Bank, FSB, without prejudice and without leave
24 to amend.

25 The court denies the Motion as to the First Cause of Action
26 for Declaratory Relief as to OneWest Bank, FSB.

27 This Memorandum Opinion and Decision constitutes the court's
28 findings of fact and conclusions of law pursuant to Fed. R. Civ. P.

52, and Fed. R. Bankr. P. 9014 and 7052.

The court shall issue an order consistent with this ruling.

Dated: July 1, 2011



RONALD H. SARIS, Judge
United States Bankruptcy Court

This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

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